

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

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**No. 95-0459**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**IN RE THE MARRIAGE OF:**

**PATRICIA M. IHLENFELDT,**

**Petitioner-Respondent,**

**v.**

**MICHAEL L. IHLENFELDT,**

**Respondent-Appellant.**

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

FINE, J. Michael L. Ihlenfeldt appeals from a judgment granting a divorce from Patricia M. Ihlenfeldt. First, he challenges the trial court's decision that personal-injury proceeds received by him as the result of an automobile accident that occurred during the marriage are subject to equitable division.

Second, he argues that the trial court should not have set child support based upon his earning capacity when neither party provided evidence of that earning capacity. Third, Mr. Ihlenfeldt contends that maintenance should not be based on earning capacity. Finally, he alleges that the trial court misused its discretion in its allocation of marital debt. We affirm in part, reverse in part, and remand this case to the trial court for further proceedings.

## I.

The parties were married on June 2, 1979. One child was born during the marriage. During the marriage, Mr. Ihlenfeldt was injured in an automobile accident. The case was settled. Some of the money received from the settlement was invested in a duplex. The trial court found:

This property was purchased in part as a result of [Mr. Ihlenfeldt] having received a settlement after suffering personal injury. He obtained, as settlement, the sum of \$19,944.93 in July of 1990 and the sum of \$37,634.90 in June of 1992. These proceeds were deposited in an account in his name. Regardless of the nature of the discussions between the parties, that money or part of it, was invested in the duplex.<sup>1</sup>

Mr. Ihlenfeldt testified that settlement money was invested in the duplex to provide for his future surgery. Mrs. Ihlenfeldt's testimony is unclear as to why the money was invested in the duplex. The settlement agreement did not allocate the money into past or future pain and suffering, loss of earnings, or past or future medical expenses. In concluding that the personal-injury settlement was subject to division, the trial court found:

[The] composition of the settlement, in so far as the portions thereof relating to past and future medical expenses,

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<sup>1</sup> At oral argument neither party disputed that a substantial portion of the settlement was used to pay, as testified to by Mr. Ihlenfeldt, "household accounts."

past and future wage loss and pain and suffering, is not clear on this record. Under the facts and circumstances of this case, the settlement for the respondent's personal injury has retained its marital character and is not subject to the clear and discernable elements which is required if this court is to deviate as [Mr. Ihlenfeldt] requests.

During the marriage, Mr. Ihlenfeldt was employed by Red Cap Industries. At the time of the divorce proceedings, Mr. Ihlenfeldt was no longer employed by Red Cap. He had a severance agreement with Red Cap, however, under which he was to receive \$4,634.30 per month for six months. The trial court set Mr. Ihlenfeldt's child-support obligation at seventeen percent of his monthly severance, which was his actual earnings.

In determining how much maintenance should be awarded, the trial court initially found that Mrs. Ihlenfeldt was earning \$14,040 annually and Mr. Ihlenfeldt had the ability to earn in excess of \$55,000 annually. It then considered the factors set forth in § 767.26, STATS., and concluded that Mrs. Ihlenfeldt was entitled to rehabilitative maintenance.<sup>2</sup> After balancing the

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<sup>2</sup> Section 767.26, STATS., provides:

**Maintenance payments.** Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial

respective incomes of the parties, their economic needs, their respective child support obligations, the property division and the totality of the circumstances, the trial court awarded \$500 per month to Mrs. Ihlenfeldt as maintenance for five years. On reconsideration, however, the trial court modified its ruling by reserving maintenance jurisdiction and suspending the payment of maintenance until Mr. Ihlenfeldt got a job. The trial court also allocated the marital debt to the parties, and made Mr. Ihlenfeldt responsible for a greater portion of the debt than Mrs. Ihlenfeldt.

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responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.
- (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
- (9) The contribution by one party to the education, training or increased earning power of the other.
- (10) Such other factors as the court may in each individual case determine to be relevant.

## II.

### A. *Personal-injury settlement proceeds.*

Upon divorce, a trial court exercises its discretion in the division of the property. *Wilberscheid v. Wilberscheid*, 77 Wis.2d 40, 44, 252 N.W.2d 76, 79 (1977). In order to sustain a trial court's discretionary ruling, this court must find that: (1) the trial court examined the relevant facts; (2) applied the appropriate law; and (3) demonstrated a rational process in reaching a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414-415, 320 N.W.2d 175, 184 (1982).

Section 767.255, STATS., governs the distribution of marital assets.<sup>3</sup> A personal-injury settlement is property of the marital estate subject to division,

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<sup>3</sup> Section 767.255, STATS., provides:

**Property division.** (1) Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (h), the court shall divide the property of the parties and divest and transfer the title of any such property accordingly. A certified copy of the portion of the judgment that affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated. The court may protect and promote the best interests of the children by setting aside a portion of the property of the parties in a separate fund or trust for the support, maintenance, education and general welfare of any minor children of the parties.

- (2) (a) Except as provided in par. (b), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:
1. As a gift from a person other than the other party.
  2. By reason of the death of another, including, but not limited to, life insurance proceeds; payments made under a deferred employment benefit plan, as defined in s. 766.01 (4) (a), or an individual retirement account; and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer on death arrangement under ch. 705.

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3. With funds acquired in a manner provided in subd. 1. or 2.
- (b) Paragraph (a) does not apply if the court finds that refusal to divide the property will create a hardship on the other party or on the children of the marriage. If the court makes such a finding, the court may divest the party of the property in a fair and equitable manner.
  
- (3) The court shall presume that all property not described in sub. (2) (a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:
  - (a) The length of the marriage.
  - (b) The property brought to the marriage by each party.
  - (c) Whether one of the parties has substantial assets not subject to division by the court.
  - (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
  - (e) The age and physical and emotional health of the parties.
  - (f) The contribution by one party to the education, training or increased earning power of the other.
  - (g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
  - (h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
  - (i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.
  - (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
  - (k) The tax consequences to each party.
  - (L) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.
  - (m) Such other factors as the court may in each individual case determine

*Mack v. Mack*, 108 Wis.2d 604, 608, 323 N.W.2d 153, 154-155 (Ct. App. 1982), but the presumption of equal division established by § 767.255, STATS., does not apply, *Richardson v. Richardson*, 139 Wis.2d 778, 780, 407 N.W.2d 231, 232 (1987) (claim not reduced to settlement or judgment during the marriage); *Krebs v. Krebs*, 148 Wis.2d 51, 435 N.W.2d 240 (1989) (pre-divorce settlement).

[I]n dividing a personal injury claim (before settlement of or judgment on the claim), a circuit court should presume that the injured spouse is entitled to the entire amount recovered for loss of bodily function, future earnings (that is after the date of divorce) and pain and suffering; that the 'uninjured' spouse is entitled to the entire amount recovered for loss of consortium; and that the amounts recovered for medical and other expenses and loss of earning incurred during the marriage are to be distributed equally.

*Richardson*, 139 Wis.2d at 780, 407 N.W.2d at 232.

Proceeds of a structured settlement received after the divorce that are not allocated among the various components generally encompassed by such settlements ("pain, suffering, bodily injury, future earnings, past medical and other expenses," future medical and other expenses, etc.) presumptively go to the injured spouse. *Krebs*, 148 Wis.2d at 57, 435 N.W.2d at 243. This presumption also applies to traceable proceeds received during the marriage. *Weberg v. Weberg*, 158 Wis.2d 540, 548-550, 463 N.W.2d 382, 385-386 (Ct. App. 1990). Further, where the record does not disclose "any division or separation based on type of damage," and is thus unallocated, the injured spouse is entitled to the entire amount of the proceeds that can be traced. *Weberg*, 158 Wis.2d at 549 n.3, 463 N.W.2d at 386 n.3. "The trial court, of course, must still consider the factors set out in sec. 767.255, Stats. Thus 'the court may alter the presumed distribution [retention of the settlement by the injured spouse] after considering the special circumstances of the personal injury claim ... and of the parties under the statutory factors listed in sec. 767.255.'" *Id.*, 158 Wis.2d at 550,

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to be relevant.

463 N.W.2d at 386 (bracketing and ellipses by *Weberg*, quoted source omitted). The trial court erred in ruling that the traceable proceeds of Mr. Ihlenfeldt's settlement were to be split between the parties. Accordingly, we reverse on this issue, and remand the case to the trial court for further proceedings in accord with this opinion.

B. *Child support and maintenance.*

Mr. Ihlenfeldt argues that the trial court should not have set child support and maintenance based upon his earning capacity because neither party presented evidence regarding that earning capacity. Although the trial court originally based Mr. Ihlenfeldt's child-support and maintenance obligations on his earning capacity, the trial court reconsidered and set the child-support obligation as seventeen percent of Mr. Ihlenfeldt's actual earnings, and has suspended Mr. Ihlenfeldt's maintenance obligation. Mr. Ihlenfeldt is not seeking refund of any maintenance he has already paid. Accordingly, the "earning capacity" dispute is moot.

C. *Marital debt.*

Mr. Ihlenfeldt argues that the trial court erred in allocating the parties' debt. In dissolutions, debts are divided as part of property division. Property division is a matter left to the discretion of the trial court and will not be disturbed on appeal in the absence of an erroneous exercise of discretion. *Mausing v. Mausing*, 146 Wis.2d 92, 95, 429 N.W.2d 768, 770 (1988). The court's division will be sustained if it is the "product of a rational mental process" resulting in a "reasoned and reasonable determination." *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). In this case, the trial court made specific determinations as to each debt that was contested. Its methodology for determining how the debt was to be allocated was also explained. The trial court considered the appropriate factors and its decision is supported by facts in the record. The trial court, therefore, did not erroneously exercise its discretion in the allocation of marital debt. We affirm this issue.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

Publication in the official reports is not recommended.